IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 16-0716

ELAINE MITCHELL, and all others similarly situated,

Plaintiffs and Appellants,

vs.

GLACIER COUNTY AND THE STATE OF MONTANA,

Defendants and Appellees,

On Appeal from the First Judicial District, Lewis & Clark County
Cause No. ADV 2015-631
Honorable Mike Menahan Presiding

APPELLEE STATE OF MONTANA'S ANSWERING BRIEF

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I. STATEMENT OF THE ISSUES

1. Did the District Court correctly determine that the Plaintiffs lack standing to sue Glacier County?
2. Did the District Court correctly determine that the Plaintiffs lack standing to sue the State of Montana?

II. STATEMENT OF THE CASE

This appeal considers whether the Plaintiffs have standing to bring their asserted claims against Glacier County ("the County") and the State of Montana ("State"). The Plaintiffs' claims revolve around deficiencies in Glacier County's fiscal management identified by a FY2013 and FY2014 audit conducted by an independent auditor. *See* Doc. 29, ¶ 10.[1] Significantly, the fiscal mismanagement issues that form the basis of the Plaintiffs' claims are all alleged problems with **the County's** fiscal management and accounting. The Plaintiffs appear to allege that, due to these deficiencies, "it is foreseeable" that County residents and taxpayers "would be injured," but they do not detail what these allegedly foreseeable injuries are. *See id*. at ¶ 26.

[1] The Plaintiffs cite to the First Amended Complaint, Document 4. However, the Plaintiffs filed a Second Amended Complaint on February 25, 2016. The Second Amended Complaint is the operative complaint and was the complaint considered by the District Court's Order. *See* Order Dismissing Case for Lack of Standing, Doc. 60. The Second Amended Complaint is located at Document 29 in the Case Register. The only change in the Second Amended Complaint is in Count 3, ¶ 28(c), where the Plaintiffs added an allegation about class members paying property taxes under protest during subsequent tax periods.

With regards to the State, the Plaintiffs essentially allege that the State Department of Administration ("Department') failed to enforce the Montana Single Audit Act, § 2-7-501, MCA, et seq. ("SAA"), with regards to the County. *See* Doc. 29, Sec. Am. Compl., ¶¶ 17, 19-23, 25, 26, 29(b)(2). The Plaintiffs in turn claim that the State's alleged failure to enforce the SAA with regards to the County enabled or exacerbated the County's alleged fiscal mismanagement, thereby apparently contributing to the unspecified foreseeable injuries to County residents. *See, e.g.*, Doc. 29, ¶¶ 23, 26. For relief regarding the State, the Plaintiffs request: 1.) an order requiring the State to withhold public funds from the County under the SAA; 2.) an order requiring the State to hold "accountable" County officials that failed to ensure "strict accountability of all revenues received and money spent;" and 3.) the appointment of a receiver, paid for either by the State or County, to ensure County compliance with budgeting laws and accounting standards. *See* Doc. 29, pg. 8. Thus, the Plaintiffs' claims regarding the County and State are distinct: the Plaintiffs' claims against the County concern the County's alleged **direct** fiscal mismanagement, while the Plaintiff's claims against the State concern whether the State complied with certain duties allegedly imposed by (and necessarily circumscribed by) the SAA.

The Plaintiffs moved to certify a class under Rule 23 and the State opposed by arguing in part that the Plaintiffs lacked standing to bring their distinct claims

against the State. *See* Docs. 31, 33, and 34. Standing, of course, is a threshold requirement in every case and is therefore "a jurisdictional element that must be satisfied prior to class certification." *See Chipman v. Northwest Healthcare Corp.*, 2012 MT 242, ¶ 25, 366 Mont. 450, 457, quoting *Lee v. State of Oregon*, 107 F.3d 1382, 1390 (9th Cir. 1997); *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 20, 365 Mont. 92, 100 (noting that standing is a subset issue of justiciability).

The Plaintiffs resisted the consideration of standing in the context of a motion for class certification and sought partial summary judgment on the standing issues. Doc. 41. The State again argued that the distinct legal bases of Plaintiffs' claims against the State did not grant them standing to sue the State and required dismissal of the Plaintiffs' claims. Doc. 51.

The District Court entered an Order Dismissing Case for Lack of Standing on November 16, 2016. Doc. 60. This Order held, in part, that the Plaintiffs' distinct legal bases for suing the State, an alleged violation of the SAA and Art. VIII, § 12, did not confer the sort of concrete **rights** that would provide the Plaintiffs with standing to sue the State. *See* Doc. 60, pgs. 4, 6-9. The holding turned on the dual recognition that: 1.) Art. VIII, § 12, cannot be a source of substantive individual rights because it is a non-self-executing clause that only directs the Legislature to enact some statutory scheme to promote fiscal responsibility, and 2.) the resulting statutory scheme, the SAA, does not establish

the sort of individual civil rights that could grant Plaintiffs the right to judicial relief in this instance. *Id*.

The District Court also found that the Plaintiffs had not suffered the sort of concrete injury to **property** that would grant them standing to pursue their claims against the County and State. *Id*. at pgs. 4-6. Essentially, the District Court determined that past taxpayer standing cases permitted taxpayers to sue **the governmental entity directly responsible** for the fiscal mismanagement **if the taxpayers alleged that they had suffered, or would invariably suffer, a concrete injury**. The District Court noted that in *Helena Parents Comm'n v. Lewis & Clark Co. Comm'rs*, 277 Mont. 367, 922 P.2d 1140 (1996), the Supreme Court found that the plaintiffs had suffered a concrete injury, and had standing, because they alleged that the county and school district's fiscal mismanagement would lead to higher taxes and reduced services. *See Helena Parents*, 227 Mont. at 372. Here, the District Court found that the Plaintiffs' bare allegation that it was "foreseeable" that the County's residents and taxpayers "would be injured" and the Plaintiffs' failure to allege a loss of public funds were insufficient to show concrete economic injury. *See* Doc. 60, pgs. 5-6. Of course, to meet the injury requirement of standing the Plaintiffs "must clearly allege a past, present, or threatened injury[.]" *Reichert*, ¶ 55. Where the threatened injury is too speculative or abstract, the claim will not be ripe and the plaintiffs will lack standing. *Id*. The

District Court concluded that the Plaintiffs had not demonstrated sufficiently concrete threatened injuries to their property or to their individual constitutional and statutory rights sufficient to establish standing and dismissed their claims. The Plaintiffs appeal from this Order.

III. STATEMENT OF THE FACTS

a. Facts relevant to Plaintiffs' standing to sue the State.

Of course, the issue of standing is a question of law. *Reichert*, ¶ 20. As such, and recognizing the distinct bases of the Plaintiffs' claims against the State, the details of the County's audits or budgeting are not necessary to resolving whether the Plaintiffs have standing to sue the State. The facts relevant to the issues presented for review are instead dictated by this Court's holdings on the requirements of standing under Montana law. The standing analysis at issue is circumscribed by the legal bases of the Plaintiffs' claims against the State.

The Plaintiffs are Glacier County residents and taxpayers. Doc. 29, ¶¶ 1-3. The Plaintiffs generally allege that an FY2013-FY2014 independent audit of the County revealed fiscal mismanagement **by the County**. *See* Doc. 29, ¶¶ 10-15. The audit at issue can be found at Doc. 41, Ex. 1. The Plaintiffs' Brief in Support of Motion for Partial Summary Judgment below and Opening Brief here allege subsequent instances of **the County's** fiscal mismanagement, but those instances

are not referenced by or incorporated into the operative Second Amended Complaint. *Compare* Opening Br., pgs. 6-7; Doc. 41, Ex. 2, *with* Doc. 29, ¶¶ 8-15.

The Plaintiffs' claims against the State center upon alleged violations of the SAA and specifically claim that:

- the Department "failed and declined" to enforce the SAA with regards to the deficiencies found in the FY2013/FY2014 audit (Doc. 29, ¶¶ 17, 20);
- the Department failed to withdraw financial assistance to the County as required by the SAA (Doc. 29, ¶ 21);
- the State failed to "proceed against" County officials as required by the SAA (Doc. 29, ¶ 22);
- the State has breached a duty under the SAA "to take action to deal with" the County's fiscal mismanagement (Doc. 29, ¶ 23); and
- that the State has breached duties imposed by §§ 2-7-515, -517, and -522, MCA (Doc. 29, ¶ 25).

Again, with regards to the State, the Plaintiffs claim that some unspecified "foreseeable" injury to County residents and taxpayers would result from the State's alleged failure to enforce the SAA. Doc. 29, ¶ 26. No actual or imminent specific injury has been alleged, however, despite standing's clear requirement that plaintiffs clearly allege a past, present, or threatened injury that is not wholly speculative or contingent. *Reichert*, ¶ 55.

The Plaintiffs' claims against the State hinge upon the State's alleged violations of the SAA and failure to ensure "strict accountability" under Art. VIII, § 12. However, the Plaintiffs have not clearly articulated what injury has resulted, or will inevitably result, from the State's alleged failure to enforce the SAA. Instead, the Plaintiffs claim that the State's actions injured an alleged right to strict accountability of governmental funds allegedly established by Art. VIII, § 12, and promoted by the SAA. *See* Doc. 29, ¶ 26. This focus directs the scope of the standing analysis.

b. <u>Facts regarding the SAA and State's role.</u>

The Plaintiffs' Opening Brief contains a section regarding the State's alleged failure to enforce the SAA, but this section is devoid of citations to the record demonstrating any failures. Op. Br., pgs. 8-9.[2] First, the Plaintiffs claim that the SAA requires the Department to establish general accounting methods, in accordance with GAAP, by rule. Op. Br., pg. 8. While this is an accurate quotation of § 2-7-504, MCA, the Plaintiffs fail to either explain how this section was allegedly violated or acknowledge that the Department **<u>has</u>** promulgated a rule that establishes reporting standards. *See* ARM 2.4.401. Second, the Plaintiffs accurately note that § 2-7-513, MCA, provides requirements for **<u>the County's</u>** audit reports, but fail to detail how this section was violated **<u>by the State</u>**, and the

[2] While the structure of the SAA will be more fully discussed in the State's argument with regards to standing, a correction of the Plaintiffs' inaccurate "factual" assertions regarding the statute is appropriate.

State has prescribed auditing standards and reporting forms regardless. *See* ARM 2.4.401; ARM 2.4.405.

Importantly, the Plaintiffs misquote § 2-7-512, MCA, which provides for exit reviews between the auditor and the appropriate local government official. There are no allegations that this section was violated, and it does not place requirements on the State regardless. The Plaintiffs also misquote § 2-7-514, MCA. The Plaintiffs contend that this section and section 513 require that counties and local governmental entities ("LGEs") file audit reports within six months of the close each fiscal year. *See* Op. Br., pg. 8. That is incorrect. Section 513, again, discusses auditing standards, and Section 514(1) provides that the Superintendent of Public Instruction "shall file with the department a list of school districts subject to audit under 2-7-503(3). The list must be filed with the department within 6 months after the close of the fiscal year." That section is inapplicable and does not contain the requirements that Plaintiffs allege regardless.

Plaintiffs similarly fail to acknowledge the discretionary nature of § 2-7-515(3), MCA. That statute provides that an LGE's failure to resolve audit findings or implement corrective measures "shall result in the withholding of financial assistance **in accordance with rules adopted by the department** pending resolution or compliance." § 2-7-515(3), MCA. The Plaintiffs ignore this proviso. The corresponding rule provides that, in the case of an LGE's ultimate failure to

provide an acceptable response or corrective plan, the Department "**can request, pursuant to 2-7-515, MCA**, that state agencies withhold payments of financial assistance," and the department "after consultation with the appropriate state agency or agencies, **may designate the financial assistance payments to be withheld**." ARM 2.4.409 (emphasis added). The rule indicates that the withholding of financial assistance is **discretionary**, and the Plaintiffs **cannot sue to compel such discretionary acts**. *Beasley v Flathead County*, 2009 MT 120, ¶ 18, 350 Mont. 171, 175; *Smith v Missoula County*, 1999 MT 330, ¶ 28, 297 Mont. 368, 376.

A similar flaw is present in the Plaintiffs' "factual" recitation of § 2-7-515(4), MCA. This section provides that:

> where a violation of law or nonperformance of duty is found on the part of an officer, employee, or board, the officer, employee, or board must be proceeded against by the attorney general or county, city, or town attorney as provided by law. . . . **If the county, city, or town attorney fails or refuses to prosecute the case, the department may refer the case to the attorney general to prosecute the case at the expense of the local government entity.**

§ 2-7-515(4), MCA (emphasis added). Again, this statute indicates that the Department **may** refer the case to the attorney general **if** the county, city, or town attorney fails or refuses to prosecute any case. This makes the State's decision to prosecute both discretionary and wholly contingent upon the County's failure. The

Plaintiffs **may not compel a discretionary function** like prosecution. *Doty v. Montana Com'r of Political Practices*, 2007 MT 341, ¶ 15, 340 Mont. 276, 281.

IV. STANDARD OF REVIEW

Issues of standing are questions of law, which this Court reviews de novo. *Reichert*, ¶ 20. Because standing is a threshold requirement of every case, the Supreme Court may raise and consider a party's lack of standing *sua sponte*. *Palmer v. Bahm*, 2006 MT 29, ¶ 16, 331 Mont. 105, 110.

V. SUMMARY OF THE ARGUMENT

It's telling of the standing-related shortcomings of Plaintiffs' claims against the State that the Plaintiffs' Statement of the Case leads off with a citation to a non-justiciable constitutional provision: Article VIII, § 12, of the Montana Constitution. *See* Op. Br., pg. 1; *Friends of the Wild Swan v. Dep't of Nat. Res. & Conservation*, 2005 MT 351, ¶ 25, 330 Mont. 186, 193. This is significant because, in Montana, the legal bases of Plaintiffs' claims against the State direct the analysis regarding whether Plaintiffs have standing to sue the State for their claims. This flows from the first of two basic requirements of standing under Montana law: 1.) the Plaintiffs **must allege an injury to a property or civil right**, and 2.) the injury must be distinct from an injury to the public generally. *See Stewart v. Bd. of Cty. Com'rs of Big Horn Cty.*, 175 Mont. 197, 201, 573 P.2d 184, 186 (1977). More specifically, the Supreme Court has found that where "the

alleged injury is premised on the violation of constitutional and statutory rights, standing depends on 'whether the constitutional or statutory provision ... can be understood as granting persons in the plaintiff's position a right to judicial relief.'" *Schoof v. Nesbit*, 2014 MT 6, ¶ 21, 373 Mont. 226, 233, citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

Here, the Plaintiffs' claims against the State are premised on:

1.) an alleged failure to ensure the "strict accountability" of governmental funds required by Art. VIII, § 12, with regards to Glacier County; and

2.) an alleged failure to enforce the SAA, § 2-7-501, MCA, et seq., with regards to Glacier County.

See Doc. 29, ¶¶ 17, 19-23, 25, 26, 29(b)(2). The State's argument, and the District Court's decision below, focuses on the first *Stewart* criteria and asserts that neither of the legal bases of Plaintiffs' claims against the State (Art. VIII, § 12, or the SAA) provide the Plaintiffs with standing **to sue the State for the claims asserted here**. Essentially, Art. VIII, § 12, cannot provide Plaintiffs with standing to sue the State for an alleged violation of rights allegedly provided by that provision because non-justiciable constitutional clauses **do not themselves provide individual rights**. Rather, as this Court has clearly held, the sort of claims **that plaintiffs could** base on non-justiciable provisions like Art. VIII, § 12, consider

whether the Legislature's enactment fulfilled the requirements of the constitutional provision at issue. Plaintiffs clearly do not make this sort of claim here.

The SAA also cannot be understood as granting Plaintiffs a right to the judicial relief they seek against the State. Its provisions simply do not give the State plenary power over an LGE's fiscal management, contains discretionary enforcement powers, and does not provide substantive rights to individuals like the Plaintiffs. This flows from an analysis of the plain language of the statute and analogous Supreme Court cases that considered whether statutes provided a private right of action.

First, the plain language of the SAA does not afford the public or interested individuals any opportunity to participate in the SAA's processes, either in the preparation or review of the reports required by the law or in its enforcement. The SAA instead is entirely directed to the State and likewise places sole, discretionary enforcement authority in the hands of the State. *See, e.g.*, § 2-7-517, MCA. Second, the SAA's lack of individual involvement or private rights of action is completely distinct from statutory regimes where this Court **has** found that statutes or constitutional provisions grant individuals standing or a private right of action. *See Schoof*, ¶ 22; *Mark Ibsen, Inc. v. Caring for Montanans, Inc.*, 2016 MT 111, ¶ 32, 383 Mont. 346, citing *Wombold v. Assocs. Fin. Servs. Co. of Mont., Inc.*, 2004 MT 397, ¶¶ 33-47 325 Mont. 290 (overruled in part on other grounds). Therefore,

according to both the SAA's plain language and analogous Montana Supreme Court precedent, the SAA cannot be understood as granting Plaintiffs either substantive rights or a right to sue the State for the State's alleged failure to enforce that law. The Plaintiffs' claims must be dismissed.

It must be noted that the Plaintiffs have continually conflated the conduct of Glacier County and of the State, hoping to bootstrap standing to sue the State with continued reference to the actions of the County. This is improper, and ignores both the very different legal bases underlying the allegations that the Plaintiffs brought against the County and the State and the standing analysis that Montana law requires. The Montana Supreme Court has recognized that standing to sue the State based upon a claimed violation of a constitutional or statutory right depends upon whether that constitutional or statutory right can be understood as granting the plaintiff a right to relief in that instance. *See Schoof*, ¶ 21; *see also Shockley v. Cascade Cty.*, 2014 MT 281, ¶ 16, 376 Mont. 493, 496. The Plaintiffs claim that **the State** violated the commands of Art. VIII, § 12, and failed to enforce the SAA. The focus of this appeal, at least with regards to the State, **must be on these particulars of the Plaintiffs' claims against the State**. And, neither of these provisions grant the Plaintiffs the sort of individual rights that would confer standing upon them to sue the State for Glacier County's fiscal mismanagement.

None of the other theories presented by the Plaintiffs change this conclusion. The taxpayer standing cases advanced by Plaintiffs are not relevant to the question presented here, which essentially concerns whether individuals may sue the State for the State's alleged breach of the SAA. Further, the private attorney general doctrine is concerned with the provision of attorney fees and is not a freestanding source of individual rights or standing. Similarly, the Declaratory Judgment Act is not a freestanding source of standing to bring non-justiciable claims. The Local Government Budget Act, Local Government Accounting Act, and Debt Management Act place no duties on the State that are relevant here.

None of the theories advanced by the Plaintiffs can overcome Judge Menahan's clear conclusion below: neither Art. VIII, § 12, nor the SAA grant the Plaintiffs the sort of individual rights that would give them standing to bring their claims **against the State**, and Plaintiffs' claimed injuries are vague and speculative regardless. The Plaintiffs' claims **against the State** must be dismissed.[3]

VI. ARGUMENT

a. The Plaintiffs lack standing to sue the State under the SAA or Art. VIII, § 12, for their claims against the State.

In Montana, standing includes both the constitutional requirement that plaintiffs present an actionable case or controversy and various prudential limitations. *Hefferman v. Missoula City Council*, 2011 MT 91, ¶ 31, 360 Mont.

[3] Whether the Plaintiffs have standing to sue the County based upon their different claims is not within the scope of the State's argument.

207, 255 P.3d. 80. Montana's constitutional "case or controversy" requirement stems from Article VII, § 4 of the Montana Constitution. The threshold standing requirement is absolute, and the Montana Supreme Court has held that it embodies "the same limitations as are imposed by federal courts under the Article 3 'case or controversy' provision of the United States Constitution." *Olson v. Dep't of Revenue*, 223 Mont. 464, 469, 726 P.2d 1162, 1166 (1986); *Baxter Homeowners Ass'n, Inc. v. Angel*, 2013 MT 83, ¶ 14, 369 Mont. 398, 403. The constitutional case or controversy requirement requires that the Plaintiffs "must clearly allege a past, present, or threatened injury to *a property or civil right*—**i.e., an invasion of a *legally protected interest***." *Hefferman*, ¶ 35 (emphasis added). More specifically, *Stewart* established that the "minimum criteria" that are "necessary to establish standing to sue a governmental entity" are "(1) **The complaining party must clearly allege past, present or threatened injury to a property or civil right**; and (2) the alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party." (emphasis added).

Therefore, if the legal bases of a plaintiff's claims do not provide the plaintiff with a legally protected interest, property, or civil right, then that plaintiff cannot claim that an alleged breach of that statute provides the sort of injury necessary to establish standing. Here, because the Plaintiffs' claims against the

State are predicated upon alleged violations of Art. VIII, § 12, and the SAA, these provisions **must** be understood as granting Plaintiffs the sort of individual rights that would permit them to sue the State for their requested relief. However, an analysis of these provisions shows that neither the SAA nor Art. VIII, § 12, can grant Plaintiffs a right to judicial relief against the State because neither provision grants individual rights to the Plaintiffs in these circumstances.

i. The SAA does not grant the Plaintiffs standing to sue the State.

1. The plain language of the SAA shows the Legislature did not intend to confer individual rights sufficient to provide Plaintiffs with standing to sue the State here.

Again, the Plaintiffs' claims against the State hinge upon the State's alleged violation of the SAA. *See* Doc. 29, Sec. Am. Compl., ¶¶ 17-29(b)(2). The Plaintiffs' Opening Brief asserts, in a sentence without any other substantive analysis, that the State's alleged decision to decline to enforce the SAA is an injury to their rights or interests. *See* Op. Br., pg. 15. In another conclusory sentence, the Plaintiffs assert that once the Legislature enacted the SAA, the SAA conferred rights sufficient to support standing here. *Id*. at 17. It follows that the SAA dictates whether Plaintiffs possess standing to sue the State for the State's alleged failure to enforce that law. Specifically, the Plaintiffs must allege some injury to a legally protected interest, such as a property or civil right, established by the SAA. *Heffernan*, ¶ 35; *Stewart*, 175 Mont. at 201; *Schoof*, ¶ 21. The Plaintiffs have

failed to do this, however, as a review of the plain language of the SAA and applicable Supreme Court precedent shows that the statute does not confer any substantive rights capable of granting Plaintiffs standing here.

This Court considered a very similar question in *Schoof*, where it recognized that, as here, "the critical issue in the instant case **is not** whether Schoof 'allege[s] an injury that is distinguishable from the injury to the public generally,'" but whether the plaintiffs' alleged injury is sufficiently "concrete." *Schoof*, ¶ 21 (emphasis added). As *Schoof* explained, whether a plaintiff possesses standing under a provision of Montana law to sue a governmental entity will necessarily "**depend[] on 'whether the constitutional or statutory provision . . . can be understood as granting persons in the plaintiff's position a right to judicial relief**.'" *Id*. (emphasis added). If the statute that forms the basis of a suit against the State doesn't provide any individual rights susceptible to injury or amenable to judicial relief, standing to sue the State based on that statute will not exist.

Schoof cited to the United States Supreme Court's decision in *Warth* for support, and it's important to reemphasize that Montana's constitutional "case or controversy" requirement, from which standing derives, embodies "the same" limitations imposed by the federal Article III's "case or controversy" requirement. *Olson*, 223 Mont. at 469; *Baxter*, ¶ 14. Importantly, just as the State argues, *Warth* recognized that standing "often turns on the nature and source of the claim

asserted. The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing[.]'" *Warth*, 422 U.S. 500. Judge Menahan's Order recognized this focus and correctly concluded that "[t]here are no provisions within the SAA to establish individual civil rights." Doc. 60, pg. 8. This is clear from the structure of the SAA and from an application of analogous Montana Supreme Court precedent analyzing whether various Montana statutes conferred individual rights or private rights of action.

In *Schoof*, a resident of Custer County sued to challenge a decision by the Custer County Commissioners that allowed elected county officials to receive cash payments instead of the County's contributions to a group health plan. *Schoof*, ¶ 5. The plaintiff claimed that the Commissioners' decision violated Montana's open meeting laws, and his complaint specifically alleged declaratory judgment claims regarding violations of Montana's open meeting and citizen participation laws and requested a mandamus to compel the county attorney to sue for recovery of the cash payments. *Id*. The district court dismissed the declaratory and mandamus claims, holding that the plaintiff lacked standing to bring the declaratory claims because "he had not alleged facts showing that he had suffered an injury distinct from the general public," and dismissed the mandamus claim by determining that mandamus did not apply to discretionary decisions by the county attorney regarding whether to pursue a claim. *Id*. at ¶ 8.

On appeal, the Supreme Court took a different view of the standing issue and considered whether the plaintiff's alleged injury was sufficiently "concrete" to establish standing—a question that falls under the first *Stewart* criteria, not the second. *Schoof*, ¶ 21. This Court determined that Montana's constitutional open meeting and citizen participation laws were explicitly "directed to the citizen," providing that "the public" had a right of participation and that "'no person' shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies." *Id.*; *see also* Mont. Const. art. II, § 8, § 9. The statutory provisions at issue similarly provided that "interested persons" must be afforded reasonable opportunities to submit their views or arguments prior to final governmental decisions and that all meetings of governmental bodies must be open to "the public." *See* § 2-3-111, MCA; § 2-3-203, MCA. Most importantly, the Montana Code, in the provisions of Title 2, chapter 3 regarding public participation, expressly provided that "the district courts of the state have jurisdiction to set aside an agency decision under this part upon petition made within 30 days of the date of the decision of any person whose rights have been prejudiced." *Schoof*, ¶ 22 (emphasis in original).

As the Supreme Court recognized, "it is clear that the Legislature intended to grant relief to 'any person whose rights have been prejudiced.'" *Id.* From all this—the explicit constitutional rights of participation and access granted to the

public and citizenry, the similarly explicit statutory rights conferred on persons and the public, evidence from the Constitutional Convention that the delegates intended to protect citizen participation, and the clear legislative intention that courts vindicate violations of these rights—the Supreme Court held that the plaintiff "has alleged a sufficiently concrete injury to satisfy standing requirements." *Id*. at ¶ 23.

Here, the SAA is entirely directed to the State, contains discretionary enforcement powers, and in no place references individuals or the public or grants individual rights to persons like the Plaintiffs. LGEs are required to undergo and submit an audit at least every two fiscal years if revenue or financial assistance, as evidenced by the annual financial report, is over $500,000. § 2-7-503(3)(a), MCA; § 2-7-514(1), MCA. Failure to comply with either the annual financial report or audit requirements subjects an LGE to the penalties provided in § 2-7-517, MCA. *See* § 2-7-503(7), MCA. Section 2-7-517(1), MCA, provides that the Department "**may** issue an order stopping payment of any state financial assistance" to the LGE. (emphasis added). Section 2-7-517(4), MCA, grants the Department further discretion in waiving penalties for failure to file the reports and audits required by section -503. The administrative rules provide that if the LGE fails to pay the filing fee, the Department "will" notify the LGE of this failure, but "**may**" add a late penalty or "**may**" issue an order requiring state agencies to withhold payment of any "state financial assistance" to the LGE. ARM 2.4.404. Further, § 2-7-

503(5), MCA, allows, **but does not require**, the Department to "conduct or contract for a special audit or review" of an LGE. The Department **may** designate an independent auditor to perform an audit if the LGE fails to do so, but is not required to do so. *See* § 2-7-506(5), MCA.

Within 30 days of receiving the audit reports, LGEs must notify the Department of what corrective actions they will take to address deficiencies the audit identified and submit a corrective action plan to the Department. § 2-7-515, MCA. If the Department does not accept all or a portion of a corrective action plan and/or the LGE does not agree to revise the plan in a way that is acceptable to the Department, the Department must notify the LGE of the plan's deficiencies and that "financial assistance **can** be withheld," and the Department may designate which financial assistance, **if any**, to withhold. *See* § 2-7-515, MCA; ARM 2.4.409(11), (12) and (14). Again, §2-7-515(3), MCA, provides that a failure to resolve deficiencies or adopt a corrective action plan "shall result in the withholding of financial assistance **in accordance with rules adopted by the department**," making the statute dependent upon promulgation of an administrative rule. And that rule, ARM 2.4.409, indicates that the Department "can request" the withholding of financial assistance until an acceptable response or plan is submitted, making this decision discretionary, not mandatory. Because administrative rules are interpreted according to their plan language, ARM

2.4.409's use of the permissive "can" indicates that the Department's decision to withhold financial assistance for failure to take corrective action is discretionary. *See State v. Frickey*, 2006 MT 122, ¶ 19, 332 Mont. 255, 259, 136 P.3d 558, 562 (holding "[t]he proper interpretation of an administrative rule must first be discerned through its plain language.").

The SAA and related rules grant the Department discretion in withholding financial assistance from LGEs that fail to comply with certain aspects of the law. The SAA also nowhere requires that the Department notify the public about specific deficiencies, only delinquent reports, and nowhere enables the Department to directly force an LGE to make certain changes to its fiscal management. Instead, while the Department "can" withhold financial assistance if an LGE fails to take corrective action or "may" withhold financial assistance for a failure to file the required audits or reports, the Department **is not required** to withhold this money **and it is clearly not empowered to take steps beyond the discretionary withholding of financial assistance**.

Again, in *Schoof* the Supreme Court was confronted with an identical question regarding whether Montana constitutional and statutory provisions provided sufficiently concrete individual rights that would enable a plaintiff to sue for their violation. This analysis falls under the first *Stewart* criteria, and mirrors the State's claim here—that Plaintiffs have not suffered an actionable injury

regarding the State's alleged violation of the SAA or Art. VIII, § 12. In *Schoof*, the overwhelming evidence from the text of the Constitution, the Montana Code, and the Constitutional Convention showed that the rights at issue were directed at the citizenry and that the Legislature clearly provided for a mechanism for citizen suits to enforce these rights. *See Schoof*, ¶ 22; § 2-3-114, MCA (2005). This is in marked contrast to Plaintiffs' claims against the State under the SAA at issue here, as the SAA in no place provides similar indications that the Legislature intended to either confer individual rights through the operation of Art. VIII, § 12, or the SAA or enable private suits against the State to enforce their provisions. Neither the SAA nor Art. VIII, § 12 of the Montana Constitution reference any rights conferred to the "citizenry," the "public," "interested persons," or "individuals." The SAA makes no provision for citizen suits to enforce its provisions and places sole discretion regarding enforcement in the hands of the State. *See supra*, pgs. 21-22. Individuals are afforded no opportunity to participate in the SAA's processes, they have no role in the preparation or review of the reports required by the law, and they conspicuously have no role in its enforcement.

The SAA does not involve the public or individuals and its plain language does not grant any substantive rights to individuals like the Plaintiffs. As a result, following *Schoof*, *Stewart*, and *Warth*, the SAA does not grant the Plaintiffs

concrete rights, and the Plaintiffs cannot seek judicial relief for alleged injuries based upon alleged violations of this statute by the State.

2. Clear Montana Supreme Court precedent on the private right of action analysis applies.

This is bolstered by an application of Montana Supreme Court cases that have analyzed whether statutes grant a private right of action for their enforcement. The U.S. Supreme Court has recognized that "the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 688, 99 S. Ct. 1946, 1953 (1979). Similarly, the Montana Supreme Court will imply a private right of action from a statute when that interpretation is consistent with the statute as a whole, if the interpretations reflects the legislative intent as evidence by the plain statutory language, if such an interpretation is reasonable so as to avoid absurd results, and if the agency charged with administration of the statute has placed a construction on it. *Mark Ibsen, Inc. v. Caring for Montanans, Inc.*, 2016 MT 111, ¶ 32, -- P.3d --, 2016 WL 2755179, citing *Wombold v. Assocs. Fin. Servs. Co. of Mont., Inc.*, 2004 MT 397, 325 Mont. 290, 104 P.3d 1080 (overruled in part on other grounds).

The *Wombold* decision considered "whether an individual claimant has the right to bring a private action to enforce a statute that primarily was intended to be regulated by a governing agency," specifically the Consumer Loan Act ("CLA") at

Title 32, Chap. 5, MCA. The SAA commits the entirety of its regulatory and enforcement provisions to the Department and fails to provide for any citizen enforcement mechanism or private right of action. In *Wombold*, while the CLA was similarly silent as to whether a private cause of action was permitted, the legislation did grant borrowers "certain rights regarding the structure of their loans." *Wombold*, ¶ 37; *Mark Ibsen, Inc.*, ¶ 33. Because of this, the Court determined that the CLA's "remedial measures" were "indicative of legislative intent to protect borrowers and are not inconsistent with allowing an implied private right of action under the CLA." *Wombold*, ¶ 39. In particular, because the CLA provided that violations of its provisions voided certain actions by lenders, the Supreme Court held that the Legislature must have intended that the "'customary incidents of voidness would follow, including the availability of suit for rescission or for an injunction against the continued operation of the contract, and for restitution.'" *Id*. at ¶ 40. Even more significantly, the CLA provided for attorney fees, and the Montana Supreme Court determined that "there would be no need" to provide for attorney fees if only the Department could enforce the CLA. *Id*. at ¶ 42. As a result, the Montana Supreme Court implied a private right of action to enforce the CLA's provisions. *Id*. at ¶ 47.

Here, unlike the CLA in *Wombold*, the SAA does not provide a basis for Plaintiffs to bring a private action against the State for its enforcement against a

local government. Unlike the CLA, the SAA does not contain beneficial or remedial provisions aimed at a certain class of citizens, the vindication of which would require litigation. And, importantly, unlike the CLA, the SAA places sole discretionary enforcement powers with the State and does not provide for the recovery of attorney fees by a prevailing party. The SAA is simply not meant to be enforced by private individuals and the SAA does not supply individual rights sufficient to grant Plaintiffs standing for their claims against the State. The Plaintiffs' claims against the State under the SAA must be dismissed.

3. The Plaintiffs' citations to taxpayer standing cases are not relevant.

A review of the Plaintiffs' proffered cases in support of their alleged right to sue the State for an alleged failure to enforce the SAA and/or Art. VIII, § 12, shows that none of the cited cases support finding such a private right of action or actionable legal injury within these Montana laws. Indeed, the taxpayer standing issues considered by these cases are wholly distinct from the issues presented here.

First, the plaintiffs in *Helena Parents* brought a declaratory judgment action against Lewis and Clark County and Helena School District Number One regarding the defendants' alleged violations of laws concerning investment of public funds. In particular, the plaintiffs claimed "that these investments were not only illegal pursuant to statute, but also resulted in a loss of more than $5.5 million of property tax revenue intended to support taxpayer services provided" by the

School District and local government entities. *Helena Parents Com'n*, 277 Mont. at 370. The district court dismissed the claims against the school district and county for a lack of standing. *Id*.

Significantly, the Supreme Court focused its review on whether the plaintiffs possessed a sufficiently personal injury to possess standing, **a question under the second *Stewart* criteria**. As a result, the Court focused its analysis on whether the plaintiffs "allege an injury personal to themselves as distinguished from one suffered by the community in general." *Id*. at 371-72. Indeed, the Supreme Court noted that "[t]he District Court, however, did not conclude that HPC failed to meet the injury requirement. **Instead, it based its dismissal of HPC's complaint on its failure to meet the second requirement for standing—'the alleged injury must be distinguishable from the injury to the public generally**.'" *Id*. at 372 (emphasis added). The Court did not discuss the question at issue here—whether Plaintiffs have even suffered an injury under the first *Stewart* criteria due to the State's actions. *Id*. at 372. The opinion went on to examine how plaintiffs may establish that their injury is distinguishable from an injury to public in general, ultimately concluding that the plaintiffs were not required to show that they suffered the harm exclusively. *Id*. at 374.

The thrust of *Helena Parents* is that "while each plaintiff claims a form of harm in common with other members of a larger class of people, the harm each

claims is not common to all members of the general public." *Id.* at 373-74. That holding, and analysis, are simply not relevant here, where the State claims that the constitutional and statutory bases of Plaintiffs' claims do not provide a right to legal redress sufficient to satisfy the first Stewart criteria, following the analysis of *Schoof*. The decision in *Lee v. State*, 195 Mont. 1, 635 P.2d 1282, is distinguishable for similar reasons. First, neither the District Court's holding nor the State's argument regarding standing were premised on the Plaintiffs alleging an injury applicable to the public generally, which is the issue at the heart of *Lee*. *See Lee*, 195 Mont. at 7. Second, Lee was suing about the unconstitutionality of a statute, and was not seeking to mandate that the State enforce a particular statute. *Id*. at 3. The claims, and the standing analyses that apply to these claims, are fundamentally different, which Plaintiffs repeatedly ignore.

Again, the State is not the LGE that allegedly mismanaged the funds at issue, and the Plaintiffs' claims against the State are predicated upon failures to enforce the SAA.[4] That is a much different claim than the sort of direct fiscal mismanagement claim the Plaintiffs make against the County and that the plaintiffs made against the LGEs in *Helena Parents* or at issue in *Lee*. Plaintiffs' claims

[4] Also, again, the State's arguments are limited to the Plaintiffs' standing to sue the State for the allegations made against the State. Plaintiffs' claims that the District Court's holding would insulate the County's fiscal mismanagement are not relevant to determining whether the Plaintiffs have standing to sue the State. The legal bases of the claims against the County and State are clearly distinct.

against the State simply must be viewed in light of the legal bases for their claim, which are the SAA and Art. VIII, § 12.

Plaintiffs' citations to *Milligan v. Miles City*, 51 Mont. 374, 153 P. 276 (1915); *Hill v. Rae*, 52 Mont. 378, 158 P. 826 (1916); *Butte-Silver Bow Local Gov't v. State*, 235 Mont. 398, 768 P.2d 327 (1989); *State ex rel. Browning v. Brandjord*, 106 Mont. 395, 81 P.2d 677 (1938); or *Grossman v. State, Dep't of Nat. Res.*, 209 Mont. 427, 682 P.2d 1319 (1984), are similarly unhelpful. Again, like with *Helena Parents*, none of these cases deal with the central question in this case: whether the legal bases for Plaintiffs' claims against the State, the SAA and Art. VIII, § 12, grant Plaintiffs a right to seek judicial relief against the State sufficient to satisfy standing's concrete injury requirement. Indeed, none of the cases stand for the proposition that Plaintiffs may sue the State to compel the State to enforce the SAA's discretionary powers against the County, which is effectively what Plaintiffs request.[5] *Milligan*, for example, considered the right to constrain "an unlawful expenditure of public money," which the Plaintiffs do not allege against the State. *Milligan*, 51 Mont. at 277. Plaintiffs instead allege that the State failed to enforce the SAA and Art. VIII, § 12, and the question here is whether these laws permit the Plaintiffs to seek to enforce their alleged violation by the State. *Hill* similarly involved an action to enjoin the issuance of public debt, which is readily

[5] Again, individuals may not sue for a writ of mandate to compel a discretionary act. *Beasley*, ¶ 18*; Smith*, ¶ 28.

distinguishable from Plaintiffs' attempt to compel the State to enforce the SAA. *See Hill*, 158 P. at 827. *Brandjord* also concerned an action to enjoin unlawful expenditures of public money, a claim fundamentally different than the Plaintiffs' claims against the State here. *Brandjord*, 81 P.2d at 679.

Butte-Silver Bow Local Government similarly concerned a declaratory judgment action regarding the constitutionality of a state law and broadly stated that taxpayers possessed standing to question the validity of a tax or the expenditure of public monies. *Butte-Silver Bow*, 235 Mont. at 400-01. Plaintiffs do not bring this sort of claim against the State here.

Finally, Plaintiffs rely heavily upon *Grossman*, but, as Judge Menahan recognized, the claims and analysis at issue in *Grossman* are distinguishable from the claims and analysis at issue here. *See* Doc. 60, pg. 8. *Grossman* involved a declaratory judgment claim regarding the constitutionality of legislation that authorized the issuance of state debt. *Grossman*, 209 Mont. at 430. Grossman specifically alleged that the Legislature's statutory scheme violated various provisions of the Montana Constitution. *Id*. at 445-466. The Supreme Court's analysis considered whether the individual taxpayer plaintiff possessed standing to contest the legislative issuance of debt, and very specifically concluded that a taxpayer possessed standing "to question the state constitutional validity of a tax or use of tax monies **where the issue or issue presented directly affect the**

constitutional validity of the state or its political subdivisions acting to collect the tax, issue bonds, or use the proceeds thereof." *Id*. at 438 (emphasis added). Plaintiffs wholly ignore the distinguishing impact of the bolded language and, as Judge Menahan recognized, "Mitchell does not challenge the constitutional validity of Glacier County's collection of taxes nor its use of the funds. Indeed, the only constitutional provision at issue is Article VIII, § 12, which simply directs the legislature to enact laws to ensure accountability of local governments. . . . *Grossman* is inapplicable here." Doc. 60, pg. 8. As noted above, Mr. Grossman challenged the constitutionality of a legislative program. *Grossman*, 209 Mont. at 445-66. Grossman did not challenge whether the State improperly failed to enforce legislation enacted pursuant to a non-self-executing clause. *Grossman* considered a fundamentally different claim, and analyzed a standing issue (injury to the public generally, under the second *Stewart* criteria) that is not at issue here.

The *Grossman* opinion analyzed whether Grossman had suffered an injury indistinguishable from an injury to the public, generally. *Id*. at 436-39. Those arguments are not at issue here. As a result, the District Court found that the claims and standing questions considered in *Grossman* were clearly distinct from those presented here, as Plaintiffs do not challenge the constitutional validity of any County taxes or expenditures and do not argue that the SAA unconstitutionally failed to fulfill the directive in Art. VIII, § 12. Doc. 60, pg. 8. Further, the State

does not argue that the Plaintiffs lack standing because they have suffered an injury shared with the public generally. The State instead argues that the Plaintiffs have not asserted a legally cognizable injury to a civil right in their claims against the State, which are predicated on the SAA. This is a question under the first *Stewart* criteria, and focuses on whether the legal bases of Plaintiffs' claims against the State (the SAA and Art. VIII, § 12) provide the sort of substantive rights that would grant Plaintiffs standing. *Grossman* is not relevant.

A review of Plaintiffs' citations shows that the cases considered fundamentally different claims and generally concerned enjoining or declaring a governmental expenditure or use of public money to be unlawful. It's important to stress that, while Plaintiffs allege the County may have unlawfully used public money, they are not making this claim against the State. Rather, the Plaintiffs claim a right to force the State to enforce the discretionary provisions of the SAA a certain way against a local government, or what amounts to a mandamus action to require the State to ensure sound LGE fiscal management. This claim is quite different than the suits directly against LGEs to restrict the unlawful expenditure of public money at issue in the above cases, and these cases are not applicable.

ii. Art. VIII, § 12, cannot provide standing to sue the State in this case because it is not a self-executing clause.

Plaintiffs misunderstand both the function of non-self-executing clauses and the sorts of claims that the Montana Supreme Court has permitted to be based upon

such clauses. The Montana Supreme Court has squarely held that, with regards to Art. VIII, § 12, "[t]he Constitution indicates that the strict accountability function is not self-executing." *Friends of the Wild Swan v. Dep't of Nat. Res. & Conservation*, 2005 MT 351, ¶ 25, 330 Mont. 186, 193. By definition, non-self-executing laws depend upon legislative action to come into force and present non-justiciable political questions because they rely upon subsequent legislative action. *See Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 15, 326 Mont. 304, 308. Once the Legislature has acted to "execute" a non-self-executing provision like Art. VIII, § 12, courts may determine "whether that enactment fulfills the Legislature's constitutional responsibility," **but that's not the claim the Plaintiffs make here**. *Id*. at ¶ 17.

Plaintiffs misunderstand the holding of *Columbia Falls* and fail to recognize the distinction between the claim they make—whether the State **has failed to enforce the statute** enacted pursuant to Art. VIII, § 12—and the claim at issue in *Columbia Falls*—whether **the statutory school funding scheme itself** fulfilled the requirements of the Public Schools Clause. *See Columbia Falls*, ¶ 10; Op. Br., pg. 16. The Plaintiffs here challenge whether the State has **violated § 12 itself and/or complied with the laws the Legislature passed** pursuant to Art. VIII, § 12. That claim was not made in *Columbia Falls*, and that case does not provide any support to Plaintiffs. Art. VIII, § 12, simply cannot act as a freestanding source of rights,

which is what the Plaintiffs' claims against the State attempt to do. Likewise, the plaintiffs in *Helena Elementary School Dist. No. 1 v. State*, 236 Mont. 44, 47, 769 P.2d 684, 686 (1989), alleged that the statutory scheme of school funding was constitutionally deficient. Plaintiffs are not challenging the constitutionality of the SAA. They claim that the State breached duties allegedly owed under the SAA and allegedly imposed by Art. VIII, § 12.

As Judge Menahan correctly held in his Order, Art. VIII, § 12, does not grant an individual the right to be free of municipal fiscal mismanagement. Doc. 60, pg. 7. "Rather, it directs the legislature to protect the public's interest in government fiscal responsibility by adopting appropriate statutes. Thus, **Mitchell cannot rely on Article VIII, § 12, to support her claim she suffered a concrete injury to a constitutional right**." *Id*. (emphasis added). Art. VIII, § 12, does not provide an individual right to "strict accountability" of government monies, and the Plaintiffs are not challenging whether the SAA fulfills the requirements of Art. VIII, § 12, the type of claim permitted in *Columbia Falls*. Art. VIII, § 12, cannot provide an independent right to judicial relief sufficient to confer standing upon the Plaintiffs for their claims against the State.

b. Neither the Declaratory Judgment Act nor Private Attorney General Doctrine provide standing.

While Plaintiffs invoke the private attorney general doctrine as a basis for their standing to bring their claims against the State, *see* Op. Br. pgs. 26-27, the

private attorney general doctrine is an equitable exception to the American rule dictating that each party pays its own attorney fees. It does not confer standing upon the Plaintiffs to enforce the SAA, it is not a cause of action, and it does not create a private right of action where none exists. *See, e.g.*, *Sunburst Sch. Dist. No. 2 v. Texaco, Inc*., 2007 MT 183, ¶¶ 88-89, 338 Mont. 259, 286; *Montanans for Responsible Use of Sch. Trust v. State ex rel. Bd. of Land Comm'rs*, 1999 MT 263, ¶¶ 63-67, 296 Mont. 402, 420.

Likewise, the threshold requirement of a justiciable controversy still applies in declaratory judgment actions. *Marbut v. Sec'y of State*, 231 Mont. 131, 135, 752 P.2d 148, 150 (1988). The DJA is not a freestanding source of standing where the Plaintiff's claims are predicated on a statute that does not grant the Plaintiffs any rights. As this Court has recognized in a case that considered a plaintiff's ability to bring a declaratory judgment claim, "we have found no case granting standing to a complainant or applicant **who shows no injury or threatened injury to himself through the act of a public official**." *Id*. at 135 (emphasis added). The DJA concerns itself with **declaring rights**. *See* § 27-8-202, MCA. The Plaintiffs will clearly lack standing to bring a declaratory judgment claim premised on a statute that, like the SAA, does not grant rights capable of injury. *Stewart*, 175 Mont. at 201; *Helena Parents*, 277 Mont. at 371; *Schoof*, ¶ 21. Essentially, the DJA does not supplant the Supreme Court's precedent regarding standing that flows from

Stewart and *Schoof*. The Supreme Court's decision in *Ridley* does not change this, as *Ridley* concerned whether a declaratory judgment action could be maintained **even if it did not resolve all the issues before the parties**. *See Ridley v. Guaranty National Insurance Co.*, 286 Mont. 325, 329, 951 P.2d 987 (1997). *Ridley* did not consider whether a declaratory action could be based on a statute that did not confer any rights capable of being injured, which is the question here.

Montana Supreme Court precedent requires that plaintiffs allege some injury to a recognized right and that, if the right is based on a statute like the SAA, show that the statute can be understood as granting persons in the Plaintiffs' position a right to judicial relief. *See Stewart*, 175 Mont. at 201; *Schoof*, ¶ 21; *Shockley*, ¶ 11. Because the SAA, the focus of the Plaintiffs' declaratory claims, cannot be understood as granting the Plaintiffs a right to judicial relief sufficient to confer standing, the Plaintiffs' declaratory judgment claims are also not judicially cognizable. Declaratory claims cannot bootstrap or manufacture standing if no individual rights are at issue in the statute that underlies the claims. The Plaintiffs' declaratory judgment claims do not cure the central standing defect of their claims: neither the SAA nor Art. VIII, § 12, can be understood as granting them a right to judicial relief.

c. **The Local Government Accounting Act, Local Government Budget Act, and Debt Management Act do not impose any duties on the State here.**

The Plaintiffs' Opening Brief references alleged "Additional Violations of Law," but the referenced laws do not involve or require any State role here. Specifically, the Plaintiffs claim the County Treasurer did not submit a cash report for June 30, 2016, in violation of the Local Government Accounting Act, § 7-6-612(2)(a), MCA. Op. Br., pg. 7. However, this statute provides that such reports are made to the County's governing body, and there is no enforcement role for the State or Department connected to these reports. *See* § 7-6-611, MCA.

Similarly, the Plaintiffs allege violations of the Local Government Budget Act, Title 7, ch. 6, part 40 ("LGBA"). Op. Br., pgs. 7-8. However, the only State role in the LGBA is found in § 7-6-4003, MCA, which provides that the State will act as a public repository for local government budgets. The State has no other role, enforcement or otherwise, under the LGBA. Further, the Plaintiffs' Second Amended Complaint similarly references "strict accountability" requirements under the Debt Management Act, § 7-7-2101, MCA, but that law does not impose any duties on the State. Instead, county indebtedness or obligations that exceed the lawful limit are simply void. *See* § 7-7-2102, MCA.

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d. <u>The Plaintiffs cannot seek to compel discretionary acts.</u>

The Plaintiffs' requested relief is also improper because it seeks a writ of mandate to compel the State to engage in what the SAA clearly provides are discretionary enforcement powers. Again, the SAA places certain audit and reporting duties on counties and permits, **<u>but does not require</u>**, the Department to withhold financial assistance to local governmental entities that fail to file annual financial reports required by § 2-7-503(1), MCA. *See* § 2-7-503(7), MCA (providing that failure to file a required audit or financial report subjects the local government to the penalties in § 2-7-517, MCA); § 2-7-517(1), MCA (providing that **<u>the department may issue</u>** an order stopping payment of any state financial assistance to the LGE); § 2-7-517(4), MCA ("The department **<u>may grant</u>** an extension to a local government entity for filing the audits and reports required under 2-7-503 **<u>or may waive</u>** the fines, fees, and other penalties imposed in this section" in certain circumstances). The SAA clearly grants the Department discretion regarding whether to penalize LGEs for failures to comply with the law, and the Plaintiffs cannot seek a writ of mandate compelling such discretionary decisions. *Doty*, ¶ 15.

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CONCLUSION

Ultimately, Plaintiffs present nonjusticiable questions of good governance, the resolution of which is more properly left to the local electoral process. Neither the Montana Constitution nor the SAA grant Plaintiffs the sort of rights that would allow them to bring an action **against the State** to mandate enforcement of "proper" accounting by local governmental entities. The discretionary powers given to the State under the SAA do not grant the State plenary power to control or manage local government finances. Plaintiffs lack standing to bring their claims against the State, have not clearly alleged injury to any property or civil right, and cannot compel discretionary powers granted by the SAA. The Plaintiffs' claims against the State must be dismissed.

Respectfully submitted this 10th day of April, 2017.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the requirements of Rule 11(4)(a) and of the Montana Rules of Appellate Procedure. I certify that this brief is printed with a proportionally space Times New Roman text typeface of 14 points and is doubled spaced. The total word count in the brief is 9,512 words, excluding the caption, Table of Contents, Table of Authorities, Table of Appendices, and Certificates of Service and Compliance. The undersigned relied on the word count of the Microsoft Word system which was used to prepare this brief.

DATED this 10th day of April, 2017.

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